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No. 86-1774

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE ALBERT RAMIREZ,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

REX BELL, District Attorney
JAMES TUFTELAND
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QUESTIONS PRESENTED

1. Whether a forcible seizure of a person followed by a maximum level of restraint and comprehensive custodial detention ab initio may be sustained upon less than traditional probable cause.

2. Whether probable cause to sustain such an intrusion may be predicated merely upon later presence in the vicinity of an alleged offense.

OPINION BELOW

The Nevada Supreme Court disposed of petitioner's case by way of an unpublished order dismissing appeal. See, Petition, Appendix A.

STATEMENT OF FACTS

The defendant's representations as to the facts of the case are supplemented and to some extent controverted as follows:

On the morning of January 13, 1985, a 25 year old woman named Jennifer Guisto

was brutally beaten and sexually assaulted by petitioner Ramirez. After leaving work and a post-work social party in Las Vegas, the victim arrived at the parking lot of her apartment at "The Pointes." She walked toward her apartment and realized she had forgotten her purse and returned to her car. Just before she got to her car she was grabbed from behind by Ramirez with him using his hand as a claw with his fingers into her face, down her throat and up her nose. The victim began to bleed profusely. She tried to tell her assailant to "take my money" and then tried to get away, resulting in the same claw hold being applied again. Her neck was twisted, she was threatened with death and her head was slammed against the pavement. The victim continually tried to get away, but Ramirez slammed her head against the pavement and goughed her eyes with his fingers, ripping

out one of her contact lenses. Next, the victim was choked until she blacked out. Finally, she was forced into her car where she was repeatedly sexually assaulted including forced fellatio, fingers in her vagina and sexual intercourse. The victim was able to persuade Ramirez to let her go by saying that she would be his girlfriend, and after leaving her car she ran to a neighbor's apartment where the police were called. Various photographs and other items of physical evidence adduced at the preliminary hearing corroborated the victim's account of the savagery of the attack, including a bite mark on her face which was still clearly visible to the court six weeks after the attack, at the time of the preliminary hearing.

At about 4:33 a.m., Sgt. George Tuggle of the Las Vegas Metropolitan Police Department was on duty when he and other police

units heard a broadcast first described as an attempted sexual assault occurring three to five minutes earlier in the "Pointes" apartments, which is a complex with many hundreds of apartments located on the southwest corner of Rochelle and Decatur. About three to four minutes later, Sgt. Tuggle arrived at the southwest corner of the "Pointes."

Sgt. Tuggle, a police officer with over nine years of experience with the Las Vegas Metropolitan Police Department, was familiar with the area of town around the "Pointes." For many months he had patrolled that area during the nighttime hours and now he knew from his own experience that pedestrian traffic at 4:30 a.m., near the corner of Decatur and Rochelle was, at least, a very rare occurrence. Accordingly, Sgt. Tuggle turned off the lights on his police car and took up a position on

Rochelle about twenty-five yards west of Decatur in a darkened area. Sgt. Tuggle knew that the suspect in the crime was last seen on foot inside the "Pointes" and he hoped that in his haste to flee the scene of the crime the perpetrator would not see the police car until Sgt. Tuggle had seen him first. Sgt. Tuggle knew from the police broadcast that the suspect was a Latin male, 5' 8" tall, medium build, mustache, beard and dark curly hair, wearing blue jeans and a maroon jacket with a white stripe. About ten minutes after Sgt. Tuggle had taken up his position, he saw a figure come out of the shadows at the northeast corner of the "Pointes" walking on the grass about three feet from the wall around the "Pointes" and not on the sidewalk. The person was carrying what appeared to be a cloth-like object in one hand; he took two or three steps west on Rochelle and then suddenly, for no apparent reason, reversed

direction and went back around the wall. This action made Sgt. Tuggle think that this person did not want to contact the police. Sgt. Tuggle could not tell if the person was male or female at this point but based on the person's build, he believed the person was a male. The person did appear to be about 5' 6" to 5' 9", medium build and with dark hair.

Sgt. Tuggle started up his police car, made a U-turn, and went to the corner of Decatur and Rochelle. The lighting conditions on the Decatur side are very good and Sgt. Tuggle could see an individual about fifty yards from the corner of Decatur and Rochelle, walking southbound, about three feet from the outside wall of the "Pointes" but not carrying anything in either hand. The person was still walking on the grass rather than the sidewalk. As Sgt. Tuggle approached this person, he could see that

it was a man about 5' 8" to 5' 9" tall, medium build, dark curly hair, a beard and a moustache. Except for not wearing the maroon and white jacket, the man fit the suspect description exactly. In addition, the police broadcast referred to the suspect as a Latin male and the person Sgt. Tuggle saw walking had a dark complexion. There were no other people in the vicinity.

Sgt. Tuggle stopped his police car and displayed his weapon while standing behind the door of the car. He ordered the person to stop and approach the patrol car. As this occurred, Sgt. Tuggle confirmed the impression he had as he first approached the person from behind and pulled beside him, that the person did have dark curly hair, a moustache and a beard. Sgt. Tuggle ordered the person to lie on the ground while he was patted down and handcuffed. As the person first approached the patrol

car, Sgt. Tuggle noticed he had what appeared to be blood about his face and this impression was confirmed when the person got to his feet after being handcuffed. Sgt. Tuggle noticed that the person was wearing a gold chain and Playboy emblem. He immediately contacted another police officer who was with the victim to ascertain whether her assailant was wearing this item. Officer Scholer learned from the victim that the assailant had worn such an item and so advised Sgt. Tuggle. Shortly thereafter, Sgt. Tuggle was joined by Officer Hagen and the suspect (Ramirez) was given Miranda warnings. Sgt. Tuggle then made a search along the wall of the "Pointes." About twenty-five yards from the corner of Decatur and Rochelle, on the inside of the wall, he found the maroon and white jacket worn by Ramirez during the beating and sexual assault of the victim.

It is apparent that the jacket had been carried by Ramirez in his hand as he fled along the wall and around the corner before seeing Sgt. Tuggle's police car. It was laying just where Ramirez had thrown it over the wall in an effort to conceal a conspicuous identifying piece of clothing. Shortly thereafter, the victim was brought by ambulance to the location where Ramirez was being detained. She identified him as her assailant and he was placed under arrest.

A R G U M E N T

THE DISTRICT COURT RULED CORRECTLY IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

The defendant's entire "unlawful arrest" argument is based on authorities and situations which are inapposite to the

circumstances of the case at hand. Moreover, the argument "leapfrogs" over barriers of logic and, where necessary, skirts or distorts the true facts of the instant case where clear exposition of the facts would destroy his argument.

For example, a main thrust of defendant's argument is that defendant was "under arrest" as soon as he was initially "seized" by Sgt. Tuggle because the degree of custody (i.e. - not free to leave, handcuffs, etc.) never changed from the initial detention until Ramirez was formally arrested. This argument ignores basic Fourth Amendment theories and the types of fact situations giving rise to such principles. Indeed, in <u>any</u> case where as a result of an initial detention there arises probable cause to make an arrest there will <u>always</u> be a continuation of custody from the initial "Terry" stop until the ultimate arrest, during which the suspect is seized and

stays seized. Despite the impression sought to be created by defendant, there is nothing wrong with this type of a procedure.

In order to make an investigatory detention of a person, a police officer must have what this Court in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) called "specific and articulable facts" which, together with reasonable inferences from these facts, would justify the intrusion on a citizen's liberty.

Sgt. Tuggle: (1) knew that a crime of violence had occurred shortly before he arrived at the vicinity of the "Pointes"; (2) knew that the suspect was last seen on foot and therefore, as this Court said in Terry, he could reasonably assume that the suspect might continue on foot; (3) was in a location from which he might observe the suspect flee from the area; (4) arrived there soon enough after the crime to have

a reasonable belief that the suspect would not have penetrated Sgt. Tuggle's perimeter location; (5) knew that it was an isolated area; and (6) knew that foot traffic would be extremely unusual at 4:30 a.m.

At this juncture it is important to note that some of the petitioner's representations in his petition constitute a distortion of the true facts. (See, Petition, p. 5, fn. 3). Across the street there is a hardware store, but it was not open at 4:30 a.m. The bar and restaurant which are open 24 hours a day are not "in proximity" to the location where Sgt. Tuggle stopped Ramirez. During the lower court suppression hearing the court asked Sgt. Tuggle: "In relation to the corner of Rochelle and Decatur, how far away was any business that could have been open and doing business at or about this time?" Sgt. Tuggle answered, "At least a half a

mile, sir, be Billy's West Lounge." The 7-11 store at Decatur and Tropicana was further away than Billy's Lounge.

Petitioner also states that at the time Tuggle detained him, there was vehicular traffic in both directions on Decatur. (Petition, p. 5, n. 2). Tuggle testified that while he was parked on Rochelle for a period of approximately ten minutes, he thinks a couple of cars passed by on Decatur. Petitioner's attempt to have this Court believe that there was some significant vehicular traffic on Decatur at the time of the stop of petitioner is not borne out by the record.

Petitioner also claims that he was not wearing jeans when stopped. (Petition, p. 6, n. 4). That statement is not supported by the record in this case. Both the victim and Tuggle said he was wearing jeans.

Returning to the articulable facts known to the officer, Sgt. Tuggle: (7) saw

a figure in the shadows walk around the northeast corner of the Pointes close to the wall and not on the sidewalk; (8) saw this figure then go a few steps and, for no apparent reason, reverse tracks and go back the other way. As Terry permits Sgt. Tuggle to do, he inferred that the person did not want to contact the police. Sgt. Tuggle started his police car and when he got to the corner of Rochelle and Decatur he (9) saw a person (Ramirez) walking southbound away from Sgt. Tuggle and walking close to the wall and not on the sidewalk. Due to the open spaces in the vicinity and because there was no one else around, Sgt. Tuggle inferred that this was the same person who had just ducked around the corner. As Sgt. Tuggle closed with this person he noted that the person was (10) male; (11) medium build; (12) about 5' 9" tall; (13) wearing blue jeans; (14) no longer had the cloth-like object in his hand; (15) had dark curly hair;

(16) a beard; (17) a moustache; and (18) was dark skinned (knowing the suspect was described as Latino or Hispanic).

The foregoing 18 factors distinguish Sgt. Tuggle's stop and detention of Ramirez from the "roust" situations condemned by this Court. The fact that Sgt. Tuggle first pointed a gun at Ramirez and shortly thereafter handcuffed him does not alter the fact that what occurred in the case at bar was a classic example of excellent police work catching a dangerous criminal fleeing from the crime, first detaining him on reasonable suspicion and shortly thereafter arresting him on probable cause.

In United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), three men robbed a bank one afternoon. A police radio broadcast described the three as of Mexican or Iranian descent, and being armed. Two police officers were familiar with the area and drove to an area that they thought would

be a likely flight path. About fifteen minutes later, the two officers saw Bautista and Martinez walking about one-half mile from the bank. The officers noted that they were shabbily dressed and wearing short-sleeved shirts which appeared dry although it had been raining throughout the day and was raining at the time. The officers detained both suspects and frisked them for weapons with negative results. The two were then handcuffed. The police questioned the two and, based on the inconsistencies in their answers, arrested both for the bank robbery.

In Bautista, the defendants claimed that the initial stop was based on racial appearance alone and violated the requirements of Terry. The Court rejected this argument and held that there were articulable factors to validate the detention. The Court also rejected the defendant's arguments that because they were handcuffed

this transformed the stop from a "detention" to an "arrest":

> "On the one hand, handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not a part of a typical Terry stop. On the other hand, police conducting on-the-scene investigations involving potentially dangerous suspects maytake precautionary measures if they are reasonably necessary. The purpose of the Terry frisk is 'to allow the officer to pursue his investigation without fear or violence.' Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972).
>
> Defendants argue that they were automatically under arrest once they were handcuffed because from that moment on they were 'not free to leave.' Defendants rely on United States v. Beck, 598 F.2d 497 (9th Cir. 1979), and United States v. Strickler, 490 F.2d 378 (9th Cir. 1974). We considered the same argument based on the same cases in United States v. Patterson, 648 F.2d 625, 632-34 (9th Cir. 1981). A brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a Terry stop and does not necessarily convert the stop into an arrest. Id. at 632-33. We specifically approved the use of handcuffs in United States v. Thompson, 597 F.2d 187 (9th Cir. 179). The handcuffs were reasonably necessary in Thompson because the suspect had 'repeatedly attempted to reach for his inside coat pocket, despite the officers' repeated

warnings not to.' Id. at 190. See also United States v. Purry, 545 F.2d 217, 219-20 (D.C. Cir. 1976)(handcuffing of suspect permissible because the suspect 'turned and pulled away' when the police officer placed an arm on him).

In United States v. Roper, 702 F.2d 984 (11th Cir. 1983), a police officer had seen a flyer that said that Roper was wanted for federal bail jumping and giving a vehicle description and license number. During the evening, but while it was still daylight, the officer saw the suspect vehicle with two men in it. The officer approached the car with his gun drawn and ordered both men to put their hands on the dash. Roper and the other man were ordered out of the car. Subsequently, Roper was arrested and was found to be carrying a weapon.

Roper claimed that the use of the weapon by the officer changed the situation from a detention to an arrest. The Court rejected this argument. The Court listed many cases, too numerous to recount in this

brief, where it has been held that if the pointing or display of a firearm is reasonable under all of the circumstances, it does not change a detention to an arrest. Counsel respectfully directs the Court's attention to Roper, supra, at 987-989, for a review of these numerous cases.

In United States v. Perate, 719 F.2d 706 (4th Cir. 1983), police had information that two passengers in a chauffeur-driven limousine were acting strangely, had a lot of money and were probably carrying drugs. Subsequently, police pulled the vehicle over and approached with drawn guns. They asked the driver to get out and smelled marijuana when the car door opened and also saw the occupants of the rear seat to be partially clothed. Subsequently, other drugs were found in the car and on the person of Perate. Perate contended that the police action was an arrest and not an investigatory detention. The Court rejected this argument by

stating:

> "The police action which brought Perate's automobile to a halt was an investigative stop, not an arrest. Brief stops in order to determine the identity of a suspicious individual or to maintain the status quo while obtaining more information are permitted if reasonable in light of the facts known to the officers at the time. Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S. 1, 20-22, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968).
>
> Perate claims the police actions escalated the stop to an arrest. He recites the blocking of his limousine with police vehicles and drawn weapons of the officers in support of his contention that the arrest was effected when the limousine was stopped. As this court held in United States v. Seni, 662 F.2d 277 (4th Cir. 1981), cert. denied, 455 U.S. 950, 102 S.Ct. 1453, 71 L.Ed.2d 664 (1982):
>
> > (t)he fact that the officer drew his gun does not necessarily elevate the stop into an arrest. Courts have held that an officer may draw his gun and conduct a frisk when justified as a reasonable precaution for protection and safety. (Citations omitted).
>
> Here, the officers had information that one of the two men in the limousine feared for his personal safety, but did not know which of the two was Trice. Although the blockade of an

automobile is an intrusion on the individual's rights, it was balanced by the necessity of neutralizing potential danger to policemen and one occupant of the limousine. See Terry, supra, 392 U.S. at 21, 88 S. Ct. at 1879.

Based on the foregoing legal authorities and upon logic and common sense, it is clear that there was no violation of the defendant's Fourth Amendment rights in the circumstances of the case at bar.

In his treatise, Professor LeFave discusses the very issue presented by this petition:

"To conclude that the officer's conduct must be viewed as an arrest from the outset because the defendant's restriction of liberty of movement was then complete and that no significant new restraint followed when the arrest was formally made, is to create a test which would cast doubt upon most stops. The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance.... A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on

movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in Terry) 'is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.'

* * *

The correct view, then, is that an otherwise valid stop is not inevitably rendered unreasonable merely because the suspect's car was boxed in by police cars in order to prevent it from being moved. Likewise, it cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was then present. The courts have rather consistently upheld such police conduct when the circumstances ... indicated that it was a reasonable precaution for the protection and safety of the investigating officers. Likewise, under certain circumstances a police order that a suspect lie on the ground will be permissible, as will the surrounding of a pedestrian-suspect by several officers." 3 W. LeFave, Search and Seizure § 9.2(d) at 363-366.

Professor LeFave's view was cited with approval in State v. Gardner, 626 P.2d 56 (Wash. 1981) and State v. Williams, 663 P.2d 1368 (Wash.App. 1983). In United States v.

Merritt, 695 F.2d 1263 (10th Cir. 1982), the Court addressed this issue of whether the force used in making a stop converts the stop into an arrest requiring probable cause. The Court stated:

> "Under this analysis it is apparently assumed that at some point the show of force made by police conducting a stop becomes so great as to render it an arrest, regardless of the justification that may exist for the degree of force used. Resolution of the question turns on the amount of force used to effect the stop: one level of force is permissible when there is probable cause for an arrest, but when the police have only a reasonable suspicion, only a more restricted use of force is permitted.
>
> It seems to us that to focus the analysis in this manner diverts attention from the court's true concern in any Fourth Amendment case--whether the police conduct, in light of all the circumstances, was reasonable. We should not ask whether the force used was so great as to render it an arrest but, instead, whether the force used was reasonable. Whenever the police confront an individual reasonably believed to present a serious and imminent danger to the safety of the police and public, they are justified in taking reasonable steps to reduce the risk that anyone will get hurt. They should not be constrained in their

> effort to reduce the risk of injury or death simply because the facts known to them create a reasonable suspicion, but do not rise to the level of probable cause."

Id. at 1373.

Sgt. Tuggle was alone, late at night, in a fairly isolated area surrounded by desert and open area. He saw an individual who almost entirely fit the description of a person who, just twenty minutes earlier, had committed a crime of violence. Tuggle's detention of that person was not only entirely lawful, but his failure to act as he did would have been a dereliction of his duty as a police officer.

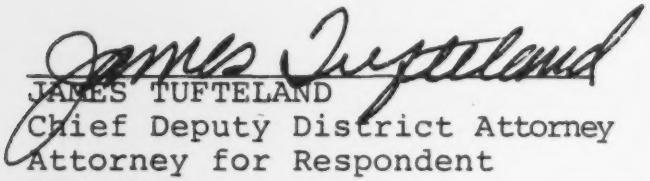
CONCLUSION

It is apparent from the existing case law in this area that the Nevada Supreme Court did not misconstrue Fourth Amendment jurisprudence in dismissing petitioner's direct appeal. Nor is that Court's Order in conflict with decisions of the Federal

courts of appeal. In fact, its order was based on decisions from the Circuit courts of appeal. There exists no sound basis for granting certiorari in this case. Respondent prays that the petition be denied.

Dated this 4th day of June, 1987.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed three copies of RESPONDENT'S BRIEF IN OPPOSITION to the attorneys of record listed below on this 4th day of June, 1987:

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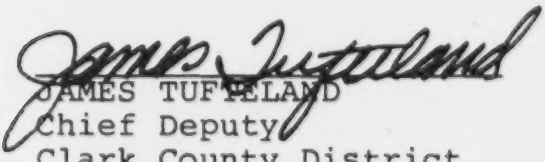

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